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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6481

CLIFFORD H. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the court of appeals affirming the order of the district court (A. 33-35) and denying rehearing (A. 36-37) are reported at 455 F. 2d 919. The opinion of the district court denying the motion for collateral relief (A. 17-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1972 (A. 35). A petition for rehearing was denied on February 25, 1972 (A. 36). The petition for a writ of certiorari was filed on April 6, 1972, and granted on October 10, 1972. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly exercised its discretion in denying without a hearing a collateral attack on a conviction based on petitioner's assertion that the system used for selecting grand jurors at the time of his indictment systematically excluded Negroes from grand juries, where petitioner failed to challenge the grand jury array prior to trial as required by Rule 12(b) of the Federal Rules of Criminal Procedure and made no showing of cause warranting relief from that rule.

STATUTES AND RULE INVOLVED

Rule 12(b) of the Federal Rules of Criminal Procedure provides in pertinent part:

(b) *The Motion Raising Defenses and Objections.*

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an

offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

* * * *

18 U.S.C. 3771 provides:

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the District of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof

but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

• • • • •
28 U.S.C. (1964 ed.) 1863(c), at the relevant times, provided:

No citizen shall be excluded from service as grand or petit juror in any court of the United States on account of race or color.

28 U.S.C. (1964 ed.) 1864, at the relevant times, provided:

• The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court. Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive \$5 per day for each day necessarily employed in the performance of his duties.

The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations,

until the box shall contain at least 300 names or such larger number as the court determines. This section shall not apply to the District of Columbia.

28 U.S.C. 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or

resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

STATEMENT

1. *The Pre-Trial Proceedings:*

An indictment returned in the United States District Court for the Northern District of Mississippi on January 30, 1968, charged petitioner, a Negro, and two others, both white, with entry into a federally insured bank with the intent to commit larceny in violation of 18 U.S.C. 2113(a). On February 18, 1968, petitioner appeared with his appointed counsel for arraignment* and entered a plea of not guilty. At the time he was given thirty days within which to file pre-trial motions (A. 2).¹ On March 6, 1968, petitioner filed a motion to quash the indictment on the ground that the indictment was the result of an illegal arrest

* The district court's memorandum opinion refers to arraignment on March 21, 1968 (A. 19). This is obviously an inadvertent reference to the date the transcript of the arraignment was filed.

¹ On this same date petitioner appeared for arraignment without counsel on a separate charge of escape. Arraignment on this charge was continued until separate counsel could be appointed. On March 8, 1968, petitioner appeared with appointed counsel for arraignment, entered a plea of not guilty, and was given thirty days within which to file motions. The escape prosecution was eventually dismissed.

(A. 31). No other pre-trial motions attacking the indictment were filed.

On May 6, 1968, following *voir dire* of the jury in open court (II T. 1-36),² the district court ruled on the pre-trial motions in chambers (II T. 30-33), ordering that the motion to dismiss the indictment on the ground of illegal arrest would be carried with the case (II T. 33-34). The trial judge then twice asked petitioner and his counsel if there was anything else and, receiving no response, the proceedings were returned to open court and the trial commenced (II T. 35-36).

2. The Trial and the Appeal.

The evidence at trial was overwhelming. The record, which is detailed in the opinion of the court of appeals on direct appeal, 409 F.2d 1095, 1096-1098 (C.A. 5), showed that petitioner and his two accomplices were apprehended about 4:30 A.M. attempting to flee from the scene of a bank burglary in Hickory Flat, Mississippi. Petitioner's clothes and shoes were found to contain residue from the break-in of the bank and slag from the cutting torch used to open the vault. Other evidence connected petitioner's two accomplices with the bank and with the car and truck parked outside the bank during the burglary. Petitioner offered no evidence in his defense.

² During the *voir dire* of the petit jury, petitioner's counsel specifically asked whether any juror would feel any prejudice toward the defendant because he was a Negro (II T. 14). "T" refers to the transcript of proceedings in the record on appeal of the original conviction. A copy of the record in four volumes has been lodged with the Clerk.

During the two and one-half days of trial, no other question was raised with respect to the indictment (II T. 37-IV T. 521). The jury found petitioner guilty. On May 21, 1968, he filed a written motion for new trial alleging nine grounds, none of which went to the indictment (A. 29). After a hearing on May 23, 1968, the motion for new trial and the earlier motion to dismiss the indictment were denied (IV T. 522, 561-564). An oral motion for new trial which did not go to the indictment was then presented and denied (IV T. 564-604). Petitioner was later sentenced to imprisonment for fourteen years.*

On appeal, petitioner's assignments of error did not relate to the alleged exclusion of Negroes from the grand jury. On April 14, 1969, petitioner's conviction was affirmed. 409 F. 2d 1095 (C.A. 5). (The court of appeals commented at that time: "We have rarely witnessed a more thorough or more unstinted expenditure of effort by able counsel on behalf of a client." 409 F. 2d at 1101).

3. *The Motion to Vacate Sentence.*

On January 19, 1971, petitioner filed a motion (A. 6-8) pursuant to 28 U.S.C. 2255 asking the court to dismiss the indictment on the ground that the grand jury that had returned it was "an unconstitutional array, inasmuch as it did not meet the mandatory

*The petitioner cannot contend that he was naive or inexperienced in the criminal process. He was forty-one years old and had a long criminal record including two prior federal felony convictions and two prior state felony convictions. (Unnumbered transcript of sentencing proceedings of May 24, 1968).

requirement of the statute laws set forth * * * in title 28, U.S.C.A. Section 1861, 1863, 1864, and the 5th amendment of the United States Constitution". He specified "that the jury commissioner and Clerk of Court for the Northern District of Mississippi for the past 20 years implementing the 'Keyman' and 'Selectors', system cause nought to [sic] token in their selection of prospective qualifying Negro jurymen because of their race in violation of Section 1863" and "that the Northern District Court has by its affirmative action taken for the past 20 years has acquiesced to systematically, purposefully, unlawfully and unconstitutionally excluded [sic] the prospective qualified resident Negroes from the Grand Jury box in violation of Section 1864" (A. 6-7).

Petitioner also alleged that he had neither waived nor abandoned the right to contest the array under Rule 12, Fed. R. Crim. P., that "the court's appointed *Law Student*,* who was researching the Grand Jury array question within, * * *, was *stopped* from seeing petitioner by the Lafayette County Sheriff" and that "a timely oral motion was made in open court *before trial* by his Court appointed lawyer" (A. 8). In an accompanying motion for discovery and inspection (A. 9-12), petitioner sought any documents setting forth the method used to obtain names of prospective jurors, and copies of questionnaires mailed to prospective jurors over the prior twenty years. He

* A law student had been assigned to assist petitioner's court-appointed attorney in preparation of his defense to the separate escape indictment.

also included a series of interrogatories relating to the selection of grand jurors during that period.

The United States denied each of the allegations of the motion, and asserted that, in any event, petitioner was entitled to no relief because the files and records of the case conclusively showed that he had not previously at any time raised any objection to the grand jury (A. 13).

On June 14, 1971, the district court filed an opinion denying the motion without a hearing (A. 17-26). The court stated (A. 19):

The Court recalls no such oral motion having been made. In order to avoid any possible oversight, injurious to the rights to the petitioner, the court has read in full the transcript of the proceedings at every stage of petitioner's prosecution and has read the entire jacket file, including docket entries. These voluminous records reveal that not the slightest reference was made to the composition of the grand jury either by petitioner or by his attorney at any stage of the proceedings. * * * The court finds, therefore, that petitioner did not object to the composition of the grand jury prior to trial and did not raise such an objection at any other stage of the proceedings, including his trial, motion for new trial, appeal, nor in his various post conviction motions, until the filing of the petition now before the court.

The district court, relying on *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, concluded that petitioner had waived his right to object to the composition of the

grand jury because this was a contention that, under Rule 12(b)(2), of the Federal Rules of Criminal Procedure, is waived unless raised by motion prior to trial (A. 19-23). The court further concluded that there was nothing in the facts of the case or in the nature of the claim justifying the exercise of the court's power under Rule 12(b)(2) to "grant relief" from the waiver for "cause shown." In so ruling, the court noted that the system for selection of grand jurors had been openly followed for many years prior to petitioner's indictment, that the same grand jury that indicted petitioner indicted his two white accomplices, and that the case against him was "a strong one" (A. 24-25).

On appeal, the court below affirmed on the basis of *Shotwell* and Rule 12(b)(2) (A. 33-34), finding that any objection to the composition of the grand jury had been waived.* In denying petitioner's motion for rehearing, the court independently found, as had the district court, that no oral pre-trial motion challenging the grand jury had been made (A. 36-37, note 1).'

*The court had previously rejected an identical claim raised by a co-defendant of petitioner who had pleaded guilty. See *Throgmartin v. United States*, 424 F. 2d 630 (C.A. 5).

'Although raised in his petition for a writ of certiorari as a question presented, petitioner apparently no longer challenges the findings of the two courts below, made without a hearing, that he did not in fact make any pre-trial challenge to the selection of the grand jury and thus that the waiver provision of Rule 12(b)(2) is, by its terms, applicable to this case. Section 2255 allows a court to dispense with an evidentiary hearing when "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief * * *."

SUMMARY OF ARGUMENT

A

Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment or information" may be raised "only by motion before trial," and that the failure to raise the "defenses or objections" as provided "constitutes a waiver thereof" (but the court "for cause shown" may grant relief from the waiver). The Advisory Committee Notes, the comments of the draftsmen, and the construction and application Rule 12(b)(2) by this Court and the courts of appeals, confirm what the language of Rule 12(b)(2) makes plain, that its waiver provisions apply to objections to the method of selecting grand jurors.

B

Petitioner was tried and convicted of illegally entering a federally insured bank with intent to commit

That authority was properly invoked here. See *Machibroda v. United States*, 368 U.S. 487, 494-495; *Sanders v. United States*, 373 U.S. 1, 19-21. See also *Burris v. United States*, 430 F. 2d 599 (C.A. 7), certiorari denied, 401 U.S. 921.

Moreover, the court of appeals stated that it too had "carefully examined all the files, record and supplementary records, as well as the transcript of testimony in this matter" and found that there "is no mention therein of a motion, oral or written, challenging the Grand Jury array". The court thus concluded: "The contention is raised for the first time, in this Section 2253 proceeding" (A. 36). In accordance with the "salutary" rule of practice, "to be followed where applicable", this Court "does not lightly overturn the concurrent findings of fact of two lower federal courts . . ." *Neil v. Biggers*, No. 71-586, decided December 6, 1972 (Slip op. p. 4, n. 3). That rule is fully applicable here.

larceny in violation of 18 U.S.C. 2113(a). The evidence against him was overwhelming and uncontroverted. Although he was represented by diligent and able defense counsel, and although petitioner himself was not a young and inexperienced defendant, no challenge was made at or before trial or on direct appeal to the methods employed in the selection of the grand jury that indicted him. Despite the clear requirements of Rule 12(b)(2), petitioner and the Amicus Curiae argue that failure to comply with "procedural rules will not in and of itself result in a waiver" of the right to object to the composition of the grand jury, and that petitioner may assert this claim three years after his trial and conviction, when retrial may no longer be possible. Petitioner places principal reliance for this proposition on *Kaufman v. United States*, 394 U.S. 217, which he asserts holds absolutely and unequivocally that the claim he raises here is not waived by his failure to assert it at or before trial, and may always be heard on collateral review.

Kaufman v. United States, however, did not involve the application of the express waiver provisions of Rule 12(b)(2). The case turned principally on the language of the federal habeas corpus statute (Section 2255 of the Judicial Code for federal prisoners). The only basis for the claim of waiver asserted there was a limitation inherent in the nature of the writ of habeas corpus—i.e., that the writ could not be issued where the petitioner had failed to assert the claim on appeal. The rejection of that argument turned on the construction of the general provisions

of the habeas corpus statute which were construed to have "expanded" the scope of the writ to permit relief in all cases where the petitioner is restrained of his or her liberty in violation of the Constitution.

The general provisions of the habeas corpus statute, however, must be read alongside the specific provisions of the Federal Rules of Criminal Procedure, not discussed in *Kaufman*. Rule 12(b)(2) does not simply afford "a procedure" for asserting an objection to the composition of the grand jury. Rather, it requires that such an objection must be timely raised or is waived. The provisions of the Federal Rules of Criminal Procedure, promulgated by this Court and accepted by Congress, are explicitly given the force of law, modifying *pro tanto* any laws inconsistent with them (18 U.S.C. 3771). Under well established canons of statutory construction, Rule 12(b)(2) governs the timeliness of asserting the kind of objection petitioner here asserts. Accordingly, cases construing the reach of the habeas corpus statute, such as *Kaufman v. United States, supra*, and *Fay v. Noia*, 372 U.S. 391, are inapplicable here, because the express waiver provision of Rule 12(b)(2), not involved in such cases, limits the non-jurisdictional claims that can be raised for the first time on collateral attack.

We do not argue here that this Court may promulgate a rule, or that Congress may enact a statute, barring collateral relief on all claims not timely asserted without regard to the effect of the alleged constitutional violation on a defendant's right to a fair trial or the reasons for the failure to make a timely objection. But Rule 12(b)(2) is not such a

broad and unyielding provision. The Rule does not apply to objections or defenses which go to the fairness of the guilt determining processes or which affect the trial in any way. Rather it is applicable only to objections based on defects in the institution of the prosecution or in the indictment," objections such as that at issue here, which if timely asserted can be rectified.

A "waiver" provision is peculiarly appropriate to such defenses, because a defendant generally has little to gain by making a timely objection. While an objection to the admissibility of evidence will result in its permanent suppression, an objection to a defect in the institution of the proceeding will generally result only in a new indictment. Thus, without the risk of waiver, there is great incentive for a defendant to delay his objection in the hope of an acquittal, and assert the objection only as another basis for upsetting a valid judgment of conviction.

Rule 12(b)(2) permits a district court judge to grant relief from the waiver provisions for "cause shown." The record is uncontroverted here that with due diligence the claims advanced here could have been discovered and asserted before trial, and that "cause" has not been shown by petitioner for the failure to make a timely objection. The denial of the petition was therefore justified.

Similar considerations would also warrant denial of the petition even if Rule 12(b)(2) were not applicable. Under the habeas corpus statute, the dis-

district court has discretion to deny collateral relief in appropriate circumstances. While the cases generally limit the discretion to deny relief to instances where the prisoner knowingly and deliberately by-passed the procedure for asserting his claim at trial or on appeal, the cases applying that standard involve errors of constitutional dimension which have a direct bearing on the prisoner's guilt or innocence, or the fairness of the trial. In the instant case, petitioner's claim does not in any way affect the determination of guilt or innocence, but alleges only a curable defect in the initiation of the proceeding. Given the nature of the claim, the three year delay before the petition was filed, the absence of any excuse for the delay, as well as the lack of any possible prejudice, the district court would be warranted in exercising its discretion to deny the petition, without regard to the express waiver provision of Rule 12(b)(2). When, along with these facts, it is not alleged that there was deliberate exclusion of Negroes from the petit jury, and since the system used for the selection of jurors, which petitioner attacks, has been replaced, the exercise of the court's discretion to reject the collateral motion is compelling.

ARGUMENT

INTRODUCTION AND BACKGROUND

This case involves the right of a federal prisoner to complain for the first time in a collateral proceeding under 28 U.S.C. 2255, several years after his conviction, about the alleged exclusion of Negroes from the

federal grand jury which had returned the indictment on which he was found guilty by a petit jury whose selection he does not challenge. In resolving this question, the Court may find it helpful to consider the context in which the question arises in this case, and which an evidentiary hearing was not needed to develop.

1. When petitioner was indicted in the Northern District of Mississippi in 1968, jury selection was governed by the Civil Rights Act of 1957, 71 Stat. 635, *et seq.* in which Congress adopted uniform federal jury qualifications but left jury selection largely to the discretion of the court clerk and a jury commissioner appointed by the district court. As petitioner alleges, the "key man" system was employed in the selection of grand jurors. Under this system, which was employed in "[m]ost federal jurisdictions" prior to the adoption of the Jury Selection and Service Act of 1968 (28 U.S.C. 1861-1869), and which was expressly approved by this Court in *Scales v. United States*, 367 U.S. 203, 259,^{*} "key men" who are "thought to have extensive contacts throughout the community, supply the names of prospective jurors" to the clerk and jury commissioner (H. Rep. No. 1076, 90th Cong., 2d Sess. n. 1). The use of the system, as the Amicus Curiae acknowledges, "has not * * * by and large [resulted in] deliberate exclusion of blacks" (Br. 19), but has instead on occasion resulted in "unintentional" under-representation of Negroes and other

^{*} See, also *United States v. Hoffa*, 349 F. 2d 20, 29 (C.A. 6), and cases cited, affirmed, 385 U.S. 293.

groups on jury lists. See, e.g., *Rabinowitz v. United States*, 366 F. 2d 34 (C.A. 5); H. Rep. No. 1076, supra; S. Rep. No. 991, 90th Cong., 1st Sess.* Because of this under-representation, the 1968 Jury Selection Act provided that each district court must adopt a plan for jury selection that includes detailed procedures designed to ensure the random selection of a fair cross section of the persons residing in the community in which the court convenes.

2. The manner in which grand and petit jurors were selected under the "key man" system in the Northern District of Mississippi was detailed by the clerk of the district court to the Senate Judiciary Subcommittee on Improvements in Judicial Machinery (see Hearings on S. 383, 90th Cong., 1st Sess. 993-996), and in an affidavit filed in response to an attack on the method of grand jury selection in that district by a defendant indicted by the same grand jury that indicted petitioner (*United States v. Polk*, N.D. Miss., No. CR.D. 6824, affirmed, 433 F. 2d 644 (C.A. 5)).¹⁰

* 18 U.S.C. 243, originally enacted in 1867, makes it an offense for any person "being an officer or other person charged with any duty in the selection or summoning of jurors," to exclude or fail to summon any citizen for duty as a grand or petit juror "on count of race, color, or previous condition of servitude."

The defendants in *Polk* were originally indicted in 1968 and by timely pre-trial motions challenged the composition of the grand jury that returned that indictment on the ground of systematic exclusion of women and Negroes. A superseding indictment in the *Polk* case was returned in September 1968 and, by stipulation and order, the motion challenging the composition of the grand jury was directed to the new grand jury. This grand jury was the same one which had indicted petitioner in 1968. The government responded with affidavits of the

The Clerk, in answer to the Committee's questionnaire, said that he gave the following instructions to the "key men" (Hearings, *supra*, p. 994): "I tell them that I need names of males and females, white and non-white." Once the names of the potential grand and petit jurors were obtained, they were divided into four "wheels" for selection of petit jurors by divisions within the district; a combined list from all four divisions was placed in a fifth wheel for selection of grand jurors. This difference accounts for petitioner's challenge only to the grand jury rather than to the petit jury which convicted him (see Petitioner's Response to the Opposition to the Petition for Certiorari, p. 3). Under this system the proportion of blacks represented on the four petit juror lists would not necessarily be the same as on the district wide grand jury list.

3. We reiterate at this introductory juncture that the present case does not involve a challenge to the composition of the petit jury that found petitioner guilty beyond a reasonable doubt, nor does it involve outright exclusion of Negroes from the grand jury that decided that he and his two white co-defendants

clerk of the district court and of numerous practicing attorneys in the Northern District of Mississippi showing that blacks were represented on juries in significant numbers. Subsequently, a stipulation was entered into between the defendants and the prosecutor that the challenge would be limited solely to the exclusion of women and that the challenge based on the exclusion of Negroes was specifically withdrawn. We are lodging with the Clerk the pleadings and affidavits filed in the *Pelt* case, which are appropriate subjects of judicial notice. See Rules 201(b)(2), (d), and (f) of the new Federal Rules of Evidence, which codify the prevailing practice.

had to stand trial. The challenge is to a method of selection—now superseded by other statutory procedures—which may have resulted in under-representation of blacks on grand juries. These facts, as we show, are significant in determining whether the district court could in the exercise of its discretion under Rule 12(b)(2) and 28 U.S.C. 2243, decline to permit petitioner to challenge an otherwise valid judgment of conviction, three years after his trial, where the issue was not timely raised, where the error does not involve the guilt determining process, but only a defect in the institution of the proceeding, and where the composition of the grand jury that indicted him could not possibly have affected its decision to accuse him.

THE ABSENCE OF A TIMELY PRETRIAL OBJECTION TO DEFECTS IN THE INSTITUTION OF THE PROSECUTION OR INDICTMENT AS REQUIRED BY RULE 12(b)(2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURES BARS COLLATERAL ATTACK BASED UPON THE CLAIM THAT NEGROES WERE EXCLUDED FROM THE GRAND JURY, UNLESS THERE IS "CAUSE SHOWN" FOR GRANTING "RELIEF FROM THE WAIVER".

Unless this Court holds Rule 12(b)(2) of the Federal Rules of Criminal Procedure unconstitutional, the decision below must be sustained. Rule 12(b)(2) provides that "defenses and objections based on defects in the institution of the prosecution or in the indictment"—other than that the indictment fails to show jurisdiction in the court or to charge an offense—"may be raised *only* by motion before trial" (emphasis added). The Rule also requires that the "motion shall

include all such defenses and objections then available to the defendant." The Rule then expressly establishes that "[f]ailure to present any such defense or objection as herein provided constitutes a waiver thereof," except that "the court for cause shown may grant relief from the waiver." The plain wording of this Rule is applicable to all defenses including alleged constitutional defects in the institution of an indictment, as this Court has ruled and as the history of the Rule indicates. The Rule, therefore, by its terms required the rejection of petitioner's collateral claim, once the courts below found that there was no sufficient "cause" to relieve him from the effect of the waiver.

A. UNDER RULE 12(b)(2), ALL DEFECTS IN THE INSTITUTION OF THE INDICTMENT, INCLUDING CONSTITUTIONAL DEFECTS, ARE WAIVED UNLESS RAISED BEFORE TRIAL.

1. In *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362, the defendants attacked the composition of the grand jury and petit jury for the first time in a post-conviction motion made four years after their trial and conviction. They alleged *inter alia* that their "constitutional rights" were violated because the method used in the selection of grand and petit juries failed to secure a cross-section of the population (371 U.S. 361-362). The district court held a hearing to determine whether "cause" was shown warranting relief from the waiver operative under Rule 12(b)(2). The district court found "that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of

due diligence before trial, [since] [t]he same method of selecting jurors had been followed by the clerk and the jury commissioner for years" (371 U.S. at 363). The failure of the defendants to exercise "due diligence" combined with the fact "that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries" (371 U.S. at 363) was held to preclude the defendants from raising the issue four years after the trial.

The court of appeals affirmed the finding of the district court, and this Court affirmed the application of the waiver provisions of Rule 12(b)(2), holding (371 U.S. 362):

We think, as the two lower courts did, that petitioners have lost these objections by years of inaction.

The holding in *Shotwell* governs this case. The attack on the grand jury here came three years after petitioner's trial. The district court found "no plausible explanation of his failure to timely make his objection" and thus refused to disregard the waiver of the objection. (A. 24-25):

The method of selecting grand jurors then in use was the same system employed by this court for years. No reason has been suggested why petitioner or his attorney could not have ascertained all of the facts necessary to present the objection to the court prior to trial. The same grand jury that indicted petitioner also indicted his two white accomplices. The case had no racial overtones. The government's case against petitioner was, although largely

circumstantial, a strong one. There was certainly sufficient evidence against petitioner to justify a grand jury in determining that he should stand trial for the offense with which he was charged. * * * The government did not require the assistance of racial prejudice in order to obtain an indictment against petitioner, and indeed petitioner does not contend that any such prejudice existed. * * *

These findings which are not challenged here warranted the rejection of petitioner's untimely challenge to the method of selecting the grand jury.

2. Petitioner, recognizing "the apparent obstacles presented by Rule 12(b)(2) F.R.Crim.P., and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341" (Br. 17), seeks to distinguish the instant proceeding from *Shotwell* on several grounds: (1) that the "concession" of the defendants in *Shotwell* that Rule 12(b)(2) applied to objections to the grand jury array "deprived this Court of any adversarial perspective on the issue and cannot be deemed conclusive against petitioner here" (Br. 18); (2) that the Court in *Shotwell* said that "both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the grand juries"; while "[i]n the case at bar prejudice is presumed" (Br. 20); (3) that "the trial court in *Shotwell* held a hearing on the objections to the jury" and the "waiver finding was only an alternative basis for [the] decision" (Br. 20); and (4) that "the objections to the array in *Shotwell* * * * did not rise to the dimension of the fundamental constitutional right

asserted by petitioner at bar" (Br. 18-19). These arguments cannot be reconciled with the opinion in *Shotwell*.

First, although the defendants in *Shotwell* conceded that the challenge to the composition of the grand jury was barred by their failure to comply with Rule 12(b)(2), they expressly contested its application to their challenge to the petit jury; but with the benefit of that "adversarial perspective," the Court nevertheless held that *both* such claims were barred by Rule 12(b)(2) (371 U.S. at 362). The present case follows *a fortiori*. While the ultimate fact finding functions served by the petit jury might have warranted a less restrictive application of the requirements of Rule 12(b)(2), when the challenge is to the selection of the trial jury," the application of the Rule even to those challenges leaves no room for argument that *Shotwell* is "not conclusive" against petitioner's belated objections to the method of selecting the grand jury here.

Second, equally without merit is petitioner's claim that this case is distinguishable from *Shotwell* because prejudice need not be shown here in order to entitle petitioner to relief. This claim was made and rejected in *Shotwell*. There, relying upon *Ballard v. United States*, 329 U.S. 187, a jury discrimination case, the defendants argued that their claim regarding the methods employed in selecting the jury did "not depend on a showing of prejudice in an indi-

¹ See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510, 519-523; *Desim v. Louisiana*, 391 U.S. 145, 155-156; *Williams v. Florida*, 399 U.S. 78, 100.

vidual case" (329 U.S. at 195). The Court agreed that where the challenge is *timely* raised no showing of prejudice is required (371 U.S. at 363):

However, where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule. Reliance on *Peters v. Kiff*, 407 U.S. 493, to avoid this aspect of *Shotwell* and to assert that "prejudice is presumed" (Br. 20) is misplaced. In *Peters*, the question was whether a white man could seek federal habeas corpus relief by asserting that Negroes had been systematically excluded from the state grand jury and petit jury that considered his case. There was no opinion for the Court; three Justices dissented on the ground that no prejudice was alleged or shown; and three Justices who concurred in the judgment allowing relief did so on the narrow ground (407 U.S. at 507) that to allow the claim to be raised even by a white defendant "would implement the strong statutory policy" of the federal Civil Rights Laws (18 U.S.C. 243 *supra*, p. 18, n. 9). Nothing was said or done to undercut the continuing vitality of the holding in *Shotwell* that the absence of any factual prejudice is relevant in determining whether a federal prisoner seeking collateral review should be relieved from the waiver of a challenge to grand jury selection.

Third, there is no basis for petitioner's claim that because the trial court in *Shotwell* held a hearing on the objection to the jury, "the waiver finding was

only an alternative basis for decision." The hearing held by the trial court, to which the *Shotwell* opinion alluded (371 U.S. at 363), related to whether facts could be adduced to warrant the exercise of the district court's discretion to "grant relief from the waiver" (371 U.S. at 362). Because this Court found that the district court had properly applied the waiver provision of Rule 12(b)(2), it expressly refrained from reaching the merits of the jury-selection claim, despite the fact that the merits were raised and argued in the briefs (371 U.S. at 364):

We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost.

This plainly refutes any argument that the waiver holding was dictum.

Fourth and finally, while the Court in *Shotwell* did not reach the merits of the challenge to the jury selection procedures, the Court obviously accepted at face value the defendants' claim that the case involved more than mere irregularities in the method of selection of grand jurors, and that just as here, their "constitutional rights" (371 U.S. at 362-363) had allegedly been violated.

Both in *Shotwell* and here, the requirements of Rule 12(b)(2) were properly applied to foreclose, as waived, a challenge to the grand jury selection that could have been timely raised but was not. The Advisory Committee Notes show beyond dispute that Rule 12(b)(2) was intended to apply to the kind of challenge to the grand jury asserted here:

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These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. * * *

In [this group] are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. * * * Among the defenses and objections in this group are the following: *Illegal selection or organization of the grand jury*, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings. * * * The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc. [18 U.S.C.A. (F.R. Crim. P., Rules 1-14), p. 607; emphasis added.]

There can be no claim that the waiver provisions were to be applicable to mere "irregularities in grand jury proceedings" not involving constitutional questions. The Advisory Committee Notes to the preliminary drafts, containing detailed discussions of Rule 12(b) (2), included a table (Table II) illustrating the defects "in the institution of the prosecution" intended to be covered by the Rule. Among the illustrative cases were those involving claims that Negroes were unconstitutionally excluded from grand juries.

See Federal Rules of Criminal Procedure Preliminary Draft (1943), p. 57, and Second Preliminary Draft (1944), p. 51. See, also, Preliminary Draft (1943) p. 68, citing *United States v. Gale*, 109 U.S. 65, 67, a jury discrimination case in which the claim was barred by failure to make a timely objection, as illustrative of the prevailing common law waiver rule. See, also, *Michel v. Louisiana*, 350 U.S. 91, 99. Moreover, the law was then settled that a failure to assert such constitutional claims seasonably in accordance with applicable procedural rules operated to bar collateral relief. See, e.g., *Brown v. Allen*, 344 U.S. 443, 485-486.

Accordingly all but one of the courts of appeals which have considered the issue have held that the failure to make a timely challenge to the array of the grand jury, on racial or other grounds, constitutes a waiver of the objection unless good cause is shown for the failure to comply with Rule 12(b)(2). See *United States v. Williams*, 421 F. 2d 529, 532 (C.A. 8); *Moore v. United States*, 432 F. 2d 730, 740 (C.A. 3, en banc); *Bustillo v. United States*, 421 F. 2d 131 (C.A. 5); *Poliasco v. United States*, 237 F. 2d 97 (C.A. 6), certiorari denied, 352 U.S. 1025; *Juelich v. Harris*, 425 F. 2d 814 (C.A. 7).¹²

¹²The one exception is the Ninth Circuit's decision in *Fernandes v. Meier*, 408 F. 2d 974, upon which petitioner (Br. 23) and the Amicus Curiae (Br. 14) rely. The court of appeals there conceded that "Rule (12)(b), *supra*, would require us to hold that failure [of defendant] to present his claim [of exclusion of Spanish Americans from the grand and petit juries] as therein required 'constitutes a waiver thereof'" (408 F. 2d 977). The court of appeals, however, relying on *Fay v. Noia*, 372 U.S. 391, and *Sanders v. United States*, 373 U.S.

The Advisory Committee Notes, the application of the Rule in *Shotwell*, and the consensus of the courts of appeals combine to refute petitioner's assertion that Rule 12(b)(2) is not applicable to the claim asserted here.

**B. THE FEDERAL HABEAS CORPUS STATUTE AND THE CASES
CONSTRUING IT DO NOT GOVERN THIS CASE**

Petitioner's contention that "[t]his case is controlled by *Kaufman v. United States*, 394 U.S. 217" (Br. 10) ignores the crucial distinctions between the two cases. In *Kaufman* the defendant, who was tried and convicted of bank robbery, sought collateral relief alleging that illegally seized evidence had been admitted against him at trial, over a timely objection (394 U.S. 220, n. 3), and that this evidence resulted in the rejection of his only defense to the charge. The district court and the court of appeals denied the application on the ground that this claim was not raised on appeal from the judgment of conviction and, "that a motion under § 2255 cannot be used in lieu of an appeal" (394 U.S. 223).

The majority of this Court in *Kaufman* held that this construction of 28 U.S.C. 2225 was inapplicable to constitutional claims (394 U.S. 227), and that collateral relief under 28 U.S.C. 2255 was not barred

1, held that despite the provisions of Rule 12(b)(2), which were plainly applicable, collateral relief could be denied under 28 U.S.C. 2255 only upon a showing of a "knowing and deliberate by-pass" of a timely objection. We shall show below, pp. 22-37, that reliance on cases which did not involve Rule 12(b)(2), and which turned solely on the application of the habeas corpus statute (28 U.S.C. 2241, *et seq.*) is not justified.

by the defendant's failure to assert the claim on appeal.²

The first and most obvious distinction is that *Kaufman* involved a claim that the applicant had been convicted on the basis of unconstitutionally seized evidence. Here, however, without in any way minimizing the importance of insuring that grand juries are selected without racial discrimination, petitioner's collateral claims do not relate to the trial itself, or to the fairness and accuracy of the guilt-finding process, and thus the need to preserve post-conviction remedies to vindicate his (alleged) rights is not nearly as strong.

But beyond this factor, *Kaufman* did not involve the application of the express waiver provisions of Rule 12(b)(2). The case turned principally on the language of the federal habeas corpus statute (Section 2255 of the Judicial Code, for federal prisoners). The only basis for the claim of waiver asserted there was a limitation inherent in the nature of the writ of habeas corpus—i.e., that the writ could not be asserted where the prisoner had failed to assert the claim on appeal. See e.g., *Sunal v. Large*, 332 U.S. 174, 179; *Brown v. Allen*, 344 U.S. 443, 487. The rejection of that argument in *Kaufman* and *Fay v. Noia*, *supra*, turned on the construction of the provisions of 28 U.S.C. 2254, enacted in 1867, which the court concluded had “expanded” the writ of habeas corpus to authorize collateral relief in “all cases where any per-

² Five Justices joined in the Court's opinion. Justices Black, Harlan, and Stewart dissented. Justice Marshall took no part.

son may be restrained of his or her liberty in violation of the constitution * * * (Kaufman v. United States, *supra*, 394 U.S. at 221, quoting Act of February 5, 1867, c. 28, § 1, 14 Stat. 385, now 28 U.S.C. 2254).¹⁴ The applicant in *Kaufman* alleged that he was "restrained in violation of the constitution"; and the Court found no basis for withholding the remedy, simply because the claim was not asserted on appeal, where the record clearly indicated that there was not a knowing and deliberate bypass of the procedures provided by way of appeal.¹⁵

The general provisions of the habeas corpus statute, however, must be read alongside the specific provisions of the Federal Rules of Criminal Procedure, not discussed in *Kaufman*. Rule 12(b)(2) does not simply afford "a procedure" for asserting an objection to the composition of the grand jury. The Rule, which has

¹⁴ The common law principles which initially determined the scope of the writ (394 U.S. at 221) precluded collateral attack on a valid judgment of conviction. "[A]t common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that the confinement was legal * * * [and] prevented issuance of the writ without more." *United States v. Hayman*, 342 U.S. 205, 211. See, also, Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 461, 452-456, 461-468 (1966); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 145, n. 13, 170-172 (1970); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31, 56-57 (1965). Cf. *Fay v. Noia*, 372 U.S. 391, 405, noting the existence of "respectable authority" for a contrary view.

¹⁵ The "deliberate by-pass rule" is likewise based on the Court's construction of the effect of the habeas corpus statute. *Fay v. Noia*, *supra*, 372 U.S. 438-439; see *infra*, pp. 37-39.

the force and effect of a statute," expressly states that the failure to raise timely objections regarding defects in the institution of the proceedings "constitutes a waiver thereof." Having been promulgated by this Court and "adopted" by Congress (*Singer v. United States*, 380 U.S. 24, 37), under well established canons of statutory construction, it is plain that Rule 12(b) (2) provides the sole and exclusive remedy for violations of the rights asserted by petitioner here and *pro tanto* modifies the statutory "expansion" of the grounds on which collateral relief could otherwise have been sought. See *Bulova Watch Co. v. United States*, 365 U.S. 753, 758, and cases cited; *United States v. Kras*, No. 71-749, decided January 10, 1973, slip op. p. 6.

We are not suggesting that this Court may promulgate a rule, or that Congress may enact a statute, barring collateral relief in all circumstances where a claim of constitutional dimension was not asserted at or before trial. A statute or rule which failed to take

"18 U.S.C. 3771, formerly 18 U.S.C. (1940 ed.) 687, provides that upon taking effect, after submission to Congress, "[a]ll laws in conflict with such rules shall be of no further force and effect" * * *. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10, holding that the Federal Rules of Civil Procedure operated to "repeal [an inconsistent] statute"; *Dupont v. United States*, 388 F. 2d 39, 44 (C.A. 5), holding that the Federal Rules of Criminal Procedure "have the force and effect of law. Just as a statute, * * * [they] must be obeyed." Accord: *Hanna v. Plumer*, 380 U.S. 460, 471; *United States v. Weinstein*, 452 F. 2d 704, 715, certiorari denied *ad nom. Grunberger v. United States*, 405 U.S. 917; *Winsor v. Daumit*, 179 F. 2d 475, 477 (C.A. 7); *John R. Allen & Co. v. Federal Nat. Bank*, 124 F. 2d 995 (C.A. 10); *American Federation of Musicians v. Stein*, 213 F. 2d 679 (C.A. 6), certiorari denied, 348 U.S. 873.

account of the reasons for failure to assert the claim, or of the nature of the constitutional claims asserted, might encounter problems under the Due Process Clause or the Suspension Clause. But neither on its face nor as applied to the present case is Rule 12(b) (2) an overly broad or unduly inflexible requirement. The Rule applies to challenges to the commencement of the proceeding that are "then available", and provides that a tardy defendant can be relieved from the waiver of such challenges if there is "cause" to do so. This procedural requirement is reasonably calculated to protect a defendant's legitimate interests while at the same time encouraging him to assert any challenges to pretrial proceedings before the trial, when they can be determined and cured, rather than years later, after the government, the court, and the witnesses have gone to the burden and expense of trial, and when retrial may be practically impossible."

The express waiver provisions of Rule 12(b) (2) do not purport to apply to all constitutional claims, but only to claims "based on defects in the institution of the prosecution or in the indictment." Such claims, unlike claims relating to the admissibility of evidence involved in *Kaufman*, generally have no effect on the process by which guilt or innocence is determined and more significantly are capable of being easily cured. While nothing can undo an illegal search or a coerced

"As the Court aptly observed in *Barker v. Wingo*, 407 U.S. 514, 521: "As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, the case will be weakened, sometimes seriously so."

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confession, defects in the indictment and institution of the proceedings can be cured by a new indictment procured in the proper manner. The practical effect of a "waiver" provision is, therefore, peculiarly appropriate to such claims, since there is generally little incentive to raise objections involving defects in the indictment or institution of the prosecution before trial. A successful attack merely results in a new indictment.

Nor is there any constitutional impediment to a waiver rule applicable in cases like this one. This Court has already rejected arguments that due process prevents establishment of a rule declaring challenges to the grand jury waived unless timely raised. In *Michel v. Louisiana*, 350 U.S. 91, the Court held that three Negro defendants charged in state courts could be barred from asserting that Negroes had been systematically excluded from the grand juries that indicted them, because they had failed to comply with a state statute requiring such challenges to the grand jury to be raised within three days after the grand jury term expired or before arraignment. There, as in the present case, the Court noted that there was no attack on the composition of the petit jury or on the fairness of the trials (350 U.S. at 98). The Court held: "It is beyond question that under the Due Process Clause . . . Louisiana may attach reasonable time limitations to the assertion of federal constitutional rights. More particularly the State may require prompt assertion of the right to challenge discriminatory practices in the make-up of

a grand jury" (350 U.S. at 97; footnote omitted). And, anticipating its later holding in *Shotwell, supra*, the Court noted: "Even in federal felony cases where, unlike state prosecutions, indictment by a grand jury is a matter of right, this Court has strictly circumscribed the time within which motions addressed to the composition of the grand jury may be made," citing Rule 12(b)(2) (350 U.S. at 99)."

Without the deterrent effect of a waiver provision, there is every incentive for a defendant to delay the claim in the hope of an acquittal, and to assert the claim only as another ground for upsetting an otherwise valid conviction, perhaps thereby achieving immunity for the crime because of the effect of delay on the ability to re-indict or reprosecute. The incentive is particularly great if, as petitioner claims, no prejudice need be shown. The instant case is illustrative. Had petitioner asserted his claim prior to trial, and had it resulted in dismissal of the indictment after appropriate proceedings, the only consequence would have been, as the courts below noted, a fresh indictment by a differently constituted grand jury.

Although an absolute waiver rule might thus be justified, Rule 12(b)(2) does not go so far. Rather, it vests discretion in the district court to grant relief

* See also, *Henry v. Mississippi*, 379 U.S. 443, 448 (indicating that failure to comply with a state rule requiring contemporaneous objection to the introduction of allegedly illegal evidence serves a legitimate governmental interest and may bar review of the underlying claim); *Williams v. Florida*, 399 U.S. 78, 80-82 (upholding a state notice-of-alibi rule, requiring the defense to notify the prosecution before trial of prospective alibi witnesses precluded from introducing their testimony).

from the waiver on a showing of "cause". Where the defect could not have been discovered through the exercise of "due diligence" (*Shotwell v. United States, supra*), or where the defendant was not represented by counsel, or was prevented by some "incapacity, or some interference by officials" (cf. *Brown v. Allen, supra*, 344 U.S. at 485-486), it might well be an abuse of discretion, if not a violation of due process, to deny relief from the waiver provisions of Rule 12(b)(2). Here, as both courts below found, no justification has been advanced for non-compliance with Rule 12(b)(2), and no prejudice has been shown. Thus, the application of the waiver provisions was plainly warranted.

The court of appeals decisions, cited by petitioner (Br. 25-28), which have granted relief in the face of state common law or statutory procedural rules similar to Rule 12(b)(2), are inapposite here. While as this Court held in *Fay v. Noia*, 372 U.S. 391, under the Supremacy Clause, "[s]tate procedural rules plainly must yield to . . . [the] overriding federal policy" that the Court found was expressed in the federal habeas corpus statute (372 U.S. at 426-427), Rule 12(b)(2) was promulgated by this Court and accepted by Congress, and thus sets forth the "overriding federal policy" as far as the claims asserted here by this federal prisoner (see *supra*, pp. 31-32 and n. 16; cf. *United States v. Singer*, 380 U.S. 24, 36-37); *Hanna v. Plumer*, 380 U.S. 460, 471).¹⁹

¹⁹ Moreover, the cases cited by petitioner (Br. 25-28), involved challenges to the petit jury as well as the grand jury. See, e.g., *United States ex rel. Goldsby v. Harpole*, 263 F. 2d 71, 83-84 (C.A. 5), certiorari denied, 361 U.S. 838, holding that the

For similar reasons, the standard for holding petitioner to have waived his claim cannot be the one he advances (see Br. 21-23)—that of a “knowing” and “deliberate by-pass” by petitioner personally. That standard, drawn from the habeas corpus statute (see *infra*, pp. 38-39), and wholly inconsistent with the language, history and interpretation of Rule 12(b)(2), would virtually nullify the provisions of the Rule. For it must be recognized that, while competent counsel will thoroughly review with his client the basic factual issues in the case and his general trial strategy, the constitutional right to legal counsel presupposes that the basic operative judgment on what procedural and legal objections should be made must be essentially the professional judgment of the lawyer. As Justice Harlan pointed out in his dissenting opinion in *Fay v. Noia*, *supra*, 372 U.S. at 471, willingness to respect only those waivers made by the “defendant himself expressly” in a case in which he is represented by competent counsel “is to undermine the entire representa-

defendant's failure to comply with a state procedural rule barred a collateral challenge to the grand jury, but not the petit jury. Cf. *Henderson v. Tollet*, 459 F. 2d 237 (C.A. 6), certiorari granted, October 10, 1972, No. 72-95, and *Winter v. Cook*, 466 F. 2d 1393 (C.A. 5), cited by petitioner (Br. 26). In *Parker v. North Carolina*, 397 U.S. 790, 798, decided after *Fay* and *Kaufman*, the Court left open the question whether a claim challenging the racial composition of a state grand jury could be raised in a federal habeas corpus proceeding where the defendant failed to comply with a state procedural rule similar to Rule 12(b)(2). Contrary to petitioner's claim *Peters v. Kiff*, *supra*, which involved a challenge to both petit and grand juries did not resolve the issue (see, *infra*, pp. 40-42, nn. 21-22).

tional system." That comment is especially apt here where on appeal from petitioner's conviction, the court of appeals underscored the exceptionally "thorough" and "unstinted" representation petitioner received from his "able counsel" (409 F.2d at 1101). We submit that it cannot be the law that Rule 12(b)(2) is of no force and effect unless the government shows that counsel fully discussed this particular claim with petitioner, and that petitioner himself "knowingly" and "intelligently" decided that there were no sufficient constitutional grounds to make it.

G. DENIAL OF THE WRIT OF HABEAS CORPUS WOULD BE JUSTIFIED EVEN UNDER THE FEDERAL HABEAS CORPUS STATUTE.

The same considerations which we have discussed above, we submit, would warrant a denial of habeas corpus relief even if Rule 12(b)(2) were not controlling here. Under the habeas corpus statute the district judge has discretion to deny relief to an applicant "under certain circumstances", (*Fay v. Noia, supra*, 372 U.S. at 438):

Discretion is implicit in the statutory command that the judge, after granting the writ and holding a hearing of appropriate scope, "dispose of the matter as law and justice require," 28 U.S.C. § 2243; and discretion was the flexible concept employed by the federal courts in developing the exhaustion rule. Furthermore, habeas corpus has traditionally been regarded as governed by equitable principles. *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 573 (dissenting opinion). Among them is

the principle that a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks." . . .

The cases in which the "knowing and deliberate by-pass" standard of *Fay v. Noia*, *supra*, 372 U.S. at 439, has been applied to hold that a constitutional claim that could have been raised in direct proceedings could nevertheless be raised collaterally involved objections which had a direct bearing on the determination of a defendant's guilt or innocence. See, *e.g.*, *Kaufman v. United States*, *supra*, where the defendant's defense was "prejudiced by the admission of unconstitutionally seized evidence" (394 U.S. at 230); *Fay v. Noia*, *supra*, involving the admission of a coerced confession. We have already shown that the claim at issue here—an objection "based on a defect in the institution of the prosecution"—is of a different nature than objections that directly relate to the guilt-determining process (*supra*, pp. 32-33, 35). This difference has found recognition in this Court's repeated adherence to its holding that the right to indictment by grand jury, while important and significant, is

"While the instant proceeding is brought pursuant to 28 U.S.C. 2255, which was enacted in 1948 to permit the habeas corpus petition to be filed in the district court in which petitioner was convicted, it has been held to have effected no change in the scope of the writ or the circumstances under which it should issue. *United States v. Hayman*, 342 U.S. 205, 219; *Kaufman v. United States*, *supra*, 394 U.S. at 221-222. Moreover, the language of 28 U.S.C. 2225, obviously contemplates the exercise of discretion in granting the relief provided (*Kaufman v. United States*, 394 U.S. at 232, n. 1, dissenting opinion of Black, J.).

not a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105; *Hurtado v. California*, 110 U.S. 516; *Peters v. Kiff*, 407 U.S. 493, 499.

This distinction between the nature of the claim asserted here and in other habeas corpus cases provides a basis for the exercise of the district court's discretion even when no "deliberate by-pass" by petitioner personally has been shown. To the extent that the grand jury is "designed as a means, not only of bringing to trial persons accused of public offences, but also as means of protecting the citizen against unfounded accusation . . ." (*Ex parte Bain*, 121 U.S. 1, 11, quoting a grand jury charge of Justice Field); *United States v. Dionisio*, No. 71-229, decided January 22, 1973 (slip op. p. 15, n. 15), the district court can readily determine from a review of the record whether the indictment was "unfounded." In the instant case for example, it is plain that petitioner, who was caught in the act of burglarizing a bank, has suffered no prejudice from the manner in which the grand jury was selected. Any grand juror, black or white, faithful to his oath, would have voted a true bill.²¹

²¹ Compare *Peters v. Kiff*, *supra*, which involved a claim of discrimination in the selection of the petit jury as well as the grand jury. The Court, permitting collateral attack, stressed "the great potential for harm latent in an unconstitutional jury-selection system, . . . the strong interest of the criminal defendant in avoiding that harm," and the impossibility of

It is, of course, true that the "exclusion of Negroes from jury service, like the arbitrary exclusion of any other well-defined class of citizens, offends a number of [other] related constitutional values." *Peters v. Kiff, supra*, 407 U.S. at 498. Such "exclusion" denies the class of potential jurors the "privilege of participating equally * * * in the administration of justice" (*Strauder v. West Virginia*, 100 U.S. 303, 308), and "it stigmatizes the whole class, even those who do not wish to participate, by declaring them unfit for jury service and thereby putting 'a brand upon them, affixed by law, an assertion of their inferiority.'" *Peters v. Kiff, supra*, 407 U.S. at 499. To withhold *any* remedy for such a violation, even if a timely objection were made, unless the defendant showed *actual* personal prejudice would impair the vindication of those other constitutional interests. Accordingly, where "timely objection has laid bare a discrimination in the selection of grand jurors" (*Hill v. Texas*, 316 U.S. 400, 406), this

determining "what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case" (407 U.S. 504). The grand jury and petit jury, however, perform significantly different functions in our system of criminal justice. While it may be impossible in some cases to say that a properly selected jury would have reached a unanimous decision to convict, it is clear beyond any "reasonable doubt" (*Chapman v. California*, 386 U.S. 18) that 12 of 23 grand jurors (representing a cross section of the community) would have voted to indict an individual caught in the act of burglarizing a bank. Confirming the view that the indictment against petitioner could not have been the consequence of racial prejudice against him as a Negro is the fact that the same grand jury also indicted his two confederates, both white.

Court has held that a defendant need not demonstrate prejudice in an individual case, *Ballard v. United States*, 329 U.S. 187, 195.

But those policy considerations do not support a holding that even without prejudice, the claim may be made on collateral attack, after his conviction when retrial may be practically impossible. As in this case, such a holding might give petitioner an unwarranted windfall—practical immunity for his crime because of his delay in challenging the proceedings—while at the same time vindicating none of the rights of allegedly excluded citizens—since the system he wants to challenge was actually abandoned years ago. Under these circumstances, we submit, “it is entirely proper” both under Rule 12(b)(2) and 28 U.S.C. 2255 “to take absence of prejudice into account” (*Shotwell Mfg. Co. v. United States, supra*, 371 U.S. at 363) in determining whether to permit collateral relief.” At this point considerations favoring

“*Peters v. Kiff, supra*, upon which petitioner relies (Br. 20) does not require a contrary result. There it was held that a white defendant could challenge the exclusion of blacks in the selection of the Georgia grand and petit juries where the claim was not raised at trial. But *Peters v. Kiff* involved a claim that had been consistently rejected by “state courts and lower federal courts” (407 U.S. at 496, n. 4). In such circumstances, this Court has held the failure to make an otherwise useless objection in the state courts is insufficient to bar relief. See e.g., *O’Connor v. Ohio*, 335 U.S. 92, holding that a defendant’s “failure to object to a practice which Ohio had long allowed cannot strip him of his right to attack the practice following its invalidation by this Court.” The right of blacks to assert the claim at issue here “has been recognized and enforced by

the finality of judgments of convictions become compelling. The President's Commission on Law Enforcement and the Administration of Justice, *Task Force Report: The Courts*, 45-47 (1967). See, also, Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 452 (1963); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. Law Rev. 142, 146-150 (1970); Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 387 (1964).

In sum, we submit that the three year delay in the assertion of a claim that could have been discovered through the exercise of "due diligence,"¹¹ and the clear absence of prejudice, would warrant the exercise of the district court's discretion to deny the petition even without regard to the express waiver provision of Rule 12(b)(2).¹² When, along with these facts, it

this Court [and lower federal courts] for almost a century" (Pet. Br. 13). Moreover, as noted *supra*, n. 21, *Peters v. Kiff* also involved an objection to the petit jury.

¹¹ Cf. *Illinois v. Allen*, 397 U.S. 337, 351 (concurring opinion of Mr. Justice Douglas), noting that while "lapse of time is not necessarily a barrier to a challenge of the constitutionality of a criminal conviction" "... in this case it should be."

¹² The fact that the error is "harmless" would under well settled law warrant the denial of collateral relief. The Great Writ plainly does not issue to cure harmless error. See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 52-53; *United States ex rel. DiRienzo v. Yeager*, 443 F. 2d 228 (C.A. 3); *Downey v. Peyton*, 451 F. 2d 236 (C.A. 4); *Lawrence v. Wainwright*, 445 F. 2d 281 (C.A. 5); *Myricks v. United States*, 434 F. 2d 629 (C.A. 6); *Ethington v. United States*, 379 F. 2d 965 (C.A. 6); *Metropolis v. Turner*, 437 F. 2d 207 (C.A. 10); *Wapnick v. United States*, 406 F. 2d 741 (C.A. 2). This, of course, is

is not alleged that there was deliberate exclusion of Negroes from the petit jury, and that the system used for the selection of jurors, which petitioner attacks, has been replaced, the exercise of the court's discretion to deny relief is compelling.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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another factor which distinguishes the instant case from *Kaufman*. While the Fourth Amendment's exclusionary rule, like the rule against discrimination in the selection of grand juries, has been held to reflect "a number of related constitutional values" (*Peters v. Koff*, *supra*, 407 U.S. at 498), independent of the defendant's right to a fair trial (*Terry v. Ohio*, 392 U.S. 1, 13-18), it is settled that collateral relief is not available if the admission of the illegally seized evidence did not prejudice the defendant significantly. *Chambers v. Maroney*, 399 U.S. 42, 52-53. There is no reason for applying a different rule here.

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IN THE

Supreme Court of the United States

October Term 1972

No. 71-6481

CLIFFORD R. BROWN

Petitioner

V.

United States of America

Respondent

PETITIONER'S REPLY BRIEF

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